

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 07 April 2004**

**BALCA Case No.: 2003-INA-97**  
**ETA Case No.: P2001-NV-09508069**

*In the Matter of:*

**CARNICERIA TRES AMIGOS ,**  
*Employer,*

*on behalf of*

**ELIAZER RUVALCABA,**  
*Alien.*

Appearances: Ricardo Marquez, Agent  
Las Vegas, Nevada  
For Employer and the Alien

Certifying Officer: Martin Rios  
San Francisco, California

Before: Burke, Chapman and Vittone  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arose from an application for labor certification on behalf of Eliazer Ruvalcaba ("the Alien") filed by Carniceria Tres Amigos ("the Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act") and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as

contained in the Appeal File (“AF”) and any written arguments of the parties. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On January 29, 2001, the Employer filed an application for labor certification on behalf of the Alien for the position of Cook, Specialty Foreign Food. (AF 28-29).

On November 5, 2002, the CO issued a Notice of Finding (“NOF”) indicating intent to deny the application on the ground that the Employer unlawfully rejected two qualified U.S. workers. (AF 23-25). The CO found that two applicants were qualified for the position as they met the minimum requirements. The CO questioned the truthfulness of the Employer’s assertion that Applicant #1 did not appear for his scheduled interview because the Employer’s letter inviting him for an interview was dated June 23, 2001, which was nineteen days before he was referred to the Employer by the state agency. (AF 25). The CO also noted that Applicant #2 was never scheduled for an interview although he met the experience requirement. The CO advised the Employer to document that each U.S. applicant was rejected solely for lawful, job-related reasons. (AF 25).

On December 6, 2002, the Employer submitted its Rebuttal. (AF 15-22). The Employer asserted that neither Applicant #1 nor Applicant #2 was qualified for the position.<sup>1</sup> The Employer noted that Applicant #1 did not have experience in seafood and because the Employer required seafood experience, Applicant #1 did not qualify for the position. Additionally, according to Applicant #2’s resume, he did not have experience with Mexican food and because one of the Employer’s requirements was advance knowledge of Mexican food, he failed to qualify for the position. (AF 15).

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<sup>1</sup> The position noted on the ETA 750A is that of Cook, however the cover letter to the Rebuttal incorrectly noted the position as “Stonemason at Frazier Masonry Corp.” (AF 15).

On December 23, 2002, the CO issued a Final Determination (“FD”) denying certification (AF 13-14). The CO noted that the Employer’s Rebuttal did not address the concerns raised in the NOF, specifically the Employer’s lack of good faith recruitment. Additionally, the Employer’s assertions in the Rebuttal were inconsistent with those in the Recruitment Report. In the Rebuttal, the Employer asserted that Applicant #1 did not have the required experience, whereas in the Recruitment Report, the Employer stated that he was not available. Accordingly, based on the inconsistencies and contradictory statements, the Rebuttal was not persuasive and the CO denied the application. (AF 14).

On January 24, 2003, the Employer filed its Request for Review and the matter was docketed in this Office on February 19, 2003. (AF 1-12). In its Request for Review, the Employer asserted that it had recruited in good faith. The Employer noted that Applicant #2 was contacted by telephone and by mail, but he failed to appear for the scheduled interview. The Employer indicated that it did not provide contradictory information, but instead provided more specific details regarding the recruitment effort. Additionally, the Employer attempted to interview Applicant #2 after the FD was issued, however he failed to appear for the interview. (AF 2-3). The Employer also stated that Applicant #1 was contacted only by mail because he did not provide a telephone number. The Employer made a second attempt to interview Applicant #1 after the FD was issued, but he again failed to appear for the scheduled interview.

The record does not reflect that the Employer filed a brief.

## **DISCUSSION**

The employer bears the burden of proving all aspects of the application. 20 C.F.R. § 656.2(b). Twenty C.F.R. § 656.25(e) provides that an employer's rebuttal evidence must rebut all of the findings in the NOF and that all findings not rebutted shall be deemed admitted. Where an employer answers the findings in the NOF with general objections, certification is properly denied. *Ramsinh K. Asher*, 1993-INA-347 (Nov. 8, 1994). A CO's finding which is not addressed in the rebuttal is deemed admitted. *Belha*

*Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). Further, failure to address a deficiency noted in the NOF supports a denial of labor certification. *Reliable Mortgage Consultants*, 1992-INA-321 (Aug. 4, 1993); *Ray Department Stores, Inc.*, 1993-INA-183 (Sept. 23, 1994).

The CO in the NOF noted that the Employer's letter to Applicant #1 was dated nineteen days before the state agency referred him to the Employer. This discrepancy caused the CO to question the truthfulness of the Employer's assertions regarding its recruitment efforts. The CO also noted that contrary to the Employer's assertions, it appeared that the Employer did not contact Applicant #1. (AF 25). As the Employer was on notice of specific flaws found in its case, the Employer was required to address the CO's concern. However, the Rebuttal was silent on this issue. The Employer failed to provide any explanation as to the discrepancy in dates, therefore failing to rebut the CO's assertion that the Employer did not actually contact Applicant #1. In rebuttal, the Employer merely stated that the applicants were not qualified for the position and provided no other documentation. Consequently, the Employer's unresponsive Rebuttal was fatal to its application for labor certification.

Because the Employer failed to demonstrate that its rejection of two U.S. workers was for lawful and job related reasons as required by the NOF<sup>2</sup>, we find that the denial of labor certification was proper.

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<sup>2</sup> We note that the Employer in its Request for Review asserted that it continued its recruitment efforts after the FD was issued. (AF 2-3, 12A). The Employer provided a copy of a letter sent to Applicant #1 and a certified mail receipt dated January 15, 2003. (AF 12A). The Employer stated that he failed to appear at the scheduled interview time. Regardless, this contact is clearly untimely and a showing that the applicant is unavailable after the recruitment period has ended does not cure the initial defect in recruitment. *See, e.g., Bruce A. Fjeld*, 1988-INA-333 (May 26, 1989) (*en banc*).

## **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.